Supreme Court, U.S.
FILED
DEC 5 1994
OFFICE OF THE CLERK

No. 94-226

In The

Supreme Court of the United States

October Term, 1994

THE FLORIDA BAR,
Petitioner,

v.

G. STEWART McHENRY,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

BRIEF OF *AMICUS CURIAE* PUBLIC CITIZEN IN SUPPORT OF RESPONDENT

David C. Vladeck
(Counsel of Record)
Alan T.L. Sun

Public Citizen Litigation Group
2000 P Street, N.W., Suite 700
Washington, D.C. 20036
(202) 833-3000

Attorneys for *Amicus Curiae*
Public Citizen, Inc.

December 5, 1994

15 pp

BEST AVAILABLE COPY

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS* 2

ARGUMENT 3

THE 30-DAY DIRECT MAIL BAN IS UNCONSTITUTIONAL. 3

I. THE PRIVACY INTERESTS CITED BY THE STATE DO NOT JUSTIFY THE BAN. 3

II. THE UNDERINCLUSIVE NATURE OF THE BAN CASTS DOUBT ON THE STRENGTH OF FLORIDA'S ASSERTED INTERESTS. 7

CONCLUSION 11

TABLE OF AUTHORITIES

Cases **Page**

In re Anis, 599 A.2d 1265, 126 N.J. 448 (N.J. 1992) . . 6

Bates v. State Bar of Arizona, 433 U.S. 350 (1977) . . . 2

Bolger v. Youngs Drug Products Corp., 463 U.S. 60 (1983) 4, 5

City of LaDue v. Gilleo, 114 S. Ct. 2038 (1994) . . . 8, 9

Cohen v. California, 403 U.S. 15 (1971) 4

Consolidated Edison Co. v. Public Service Comm'n of New York, 447 U.S. 530 (1980) 4

Edenfield v. Fane, 113 S. Ct. 1792 (1993) 2, 8

FCC v. League of Women Voters of California, 468 U.S. 364 (1984) 9

Frisby v. Schultz, 487 U.S. 474 (1988) 6

Kovacs v. Cooper, 336 U.S. 77 (1949) 6

Lamont v. Commissioner of Motor Vehicles, 269 F. Supp. 880 (S.D.N.Y.), *aff'd*, 386 F.2d 449 (2d Cir. 1967), *cert. denied*, 391 U.S. 915 (1968) 4, 5

McHenry v. The Florida Bar, 21 F.3d 1038 (11th Cir. 1994) 5, 8

Metromedia, Inc. v. San Diego, 453 U.S. 490 (1981) . . 9

Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978) 2

Peel v. Attorney Registration and Disciplinary Comm'n of Ill., 496 U.S. 91 (1990) 2

In re Primus, 436 U.S. 412 (1978) 2

Shapero v. Kentucky Bar Ass'n, 486 U.S. 466 (1988) 3, 4, 6

The Florida Star v. B.J.F., 491 U.S. 524 (1989) 8

Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985) 2

Rules & Regulations

16 C.F.R. § 429.1 (1992) 9

Rule 4.7-4(b)(6) of the Rules Governing the Florida Bar 5

Miscellaneous

Detroit Free Press, "Air Disasters Put Insurers Against Lawyers," Section NWS at 12B (August 18, 1987) 7

Detroit Free Press, "Putting a Price Tag on Life—Insurers Talk With Crash Family Victims," Section NWS at 1A (March 7, 1987) 7

In The

Supreme Court of the United States

October Term, 1994

No. 94-226

THE FLORIDA BAR,
Petitioner,

v.

G. STEWART McHENRY,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

BRIEF OF *AMICUS CURIAE* PUBLIC CITIZEN IN SUPPORT OF RESPONDENT

Amicus curiae Public Citizen, Inc. files this brief with the consent of the parties because of the important First Amendment concerns at stake in this case. In our view, Florida's 30-day ban on lawyers using direct mail to communicate with accident victims and their families unquestionably violates the First Amendment. Truthful, non-deceptive information which might inform accident victims and their families about the availability of counsel may not be suppressed absent the most compelling of reasons. Although the interests cited by The Florida Bar—protecting the privacy rights of accident victims and their families and shielding injured persons from being induced into making an ill-considered choice of lawyers—are perhaps valid in the

abstract, the 30-day mailing prohibition is not even a remotely reasonable way to achieve those ends. Accordingly, this Court should affirm the ruling below.

INTEREST OF *AMICUS*

Amicus Public Citizen is a national public interest organization with over 100,000 members. For 23 years, Public Citizen has worked to obtain and disseminate information relating to the availability and price of legal services so that consumers could make informed decisions when they are considering retaining an attorney. Public Citizen's lawyers handled two of this Court's recent cases concerning commercial speech by professionals, *Edenfield v. Fane*, 113 S. Ct. 1792 (1993), and *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), and they filed *amicus* briefs in a number of other commercial speech cases involving lawyer advertising, including *Peel v. Attorney Registration and Disciplinary Comm'n of Ill.*, 496 U.S. 91 (1990), *In re Primus*, 436 U.S. 412 (1978), *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978), and *Bates v. State Bar of Arizona*, 433 U.S. 350 (1971).

Public Citizen files this brief because it is concerned that the interests of those who have the most at stake in this proceeding—recent accident victims and their families—may not stand out in the parties' treatment of the legal issues before the Court. We do not seek to duplicate or repeat the arguments that will be put forth by respondent. Rather, we highlight two points that may not be given prominence in respondent's more comprehensive treatment of the issues.

First, The Florida Bar seriously overstates the privacy interests at stake. This Court has consistently held that the minimal intrusion that results from direct mail is far too trivial to justify a restraint on First Amendment liberties.

Second, the ban is grossly underinclusive, since it does not apply to the hordes of insurance adjusters and defense

lawyers who besiege recent accident victims and their relatives to obtain waivers or quick and inexpensive settlements. If The Florida Bar and its *amici* were genuinely interested in shielding injured accident victims and grieving families from insensitive intrusions by lawyers, the ban would a universal one, not a limited one aimed solely at the only segment of the Bar interested in protecting the rights of the victim.

ARGUMENT

THE 30-DAY DIRECT MAIL BAN IS UNCONSTITUTIONAL.

Underlying Florida's 30-day mailing ban is the theory that the State has a "substantial interest in protecting the personal privacy and tranquility of persons who were themselves, or whose loved ones were, recent victims of personal injury or death." Pet. Br. at 25. Public Citizen has no quarrel with this general sentiment. But, as we now show, the means the Bar has selected—the 30-day ban on mailings—has nothing to do with its asserted goal, and therefore the decision below should be affirmed.

I. THE PRIVACY INTERESTS CITED BY THE STATE DO NOT JUSTIFY THE BAN.

The most glaring flaw in The Florida Bar's presentation is the assumption, which underlies the rationale for the ban, that the mere receipt by an injured accident victim or a grieving relative of a letter, clearly marked in red ink as a lawyer advertisement, constitutes an egregious invasion of privacy. In a series of decisions, including *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 479 (1988), this Court has held that "the State may claim no substantial interest in restricting truthful and nondeceptive lawyer solicitations"

because the burden of having to deal with mail solicitations is too insignificant to justify a prohibition on speech. Thus, in *Shapero*, the Court struck down a categorical ban on targeted mailings by lawyers. Finding the asserted state goal of protecting against overreaching by lawyers insubstantial, the Court observed that mailings pose little threat to consumers because "[a] letter ... can readily be put in a drawer to be considered later, ignored or discarded." *Id.* at 475-76.

Shapero followed *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983), where this Court struck down a ban on mail advertisements for contraceptives. In *Bolger*, the Postal Service defended the ban by citing the need to prevent material that the recipient might find offensive from entering the home on an unsolicited basis. The Court found that this interest "carries little weight," *id.* at 71, reasoning that "[r]ecipients of objectionable mailings ... may '"effectively avoid further bombardment of their sensibilities by simply adverting their eyes."'" *Id.* at 72 (*quoting Consolidated Edison Co. v. Public Service Comm'n of New York*, 447 U.S. 530, 542 (1980), *quoting Cohen v. California*, 403 U.S. 15, 21 (1971)). And in *Consolidated Edison*, the Court overturned a New York State Public Service Commission order forbidding utilities from including "bill inserts" addressing issues of public importance. In so ruling, the Court stressed that the state's principal justification—the prevention of utility companies from forcing their views on a captive audience—was far too tenuous because customers "may escape exposure to objectionable material simply by transferring the bill insert from the envelope to the waste-basket." 447 U.S. at 542 (footnote omitted).[1]

---

[1] *Lamont v. Commissioner of Motor Vehicles*, 269 F. Supp. 880 (S.D.N.Y.), *aff'd*, 386 F.2d 449 (2d Cir. 1967), *cert. denied*, (continued...)

Florida seeks to evade the force of these rulings by arguing that recent accident victims and their families are especially emotionally vulnerable and therefore warrant greater protection than ordinary members of the public. The principal flaw in this argument is that, even assuming that The Florida Bar has correctly gauged the emotional state of the recipients (a point open question, since the ban applies to every accident victim, no matter how slight the injury, *McHenry v. The Florida Bar*, 21 F.3d 1038, 1043 n.9 (11th Cir. 1994)), another provision of the Florida Rules effectively addresses the problem. Under Rule 4.7-4(b)(6), the envelope and every page of all lawyer solicitation letters must bear a statement, in red ink, advising the recipient that the letter is a "advertisement." Once forewarned, the only recipients who will be exposed to the contents of the solicitation letters are those who take the affirmative step of opening the envelope and reading the contents. No one is compelled to do so; indeed, as the Court has noted in a host of cases, those who do not want to be troubled by such

---

[1](...continued)
391 U.S. 915 (1968), cited with approval in both *Bolger* and *Consolidated Edison*, uses perhaps the most colorful language in rejecting a privacy claim regarding mailings:

> The mail box, however noxious its advertising contents often seem to judges as to other people, is hardly the kind of enclave that requires constitutional defense to protect "the privacies of life." The short, though regular, journey from mail box to trash can . . . is an acceptable burden.

269 F. Supp. at 883.

advertisements can readily discard them unopened. *See, e.g.*, *Shapero*, 486 U.S. at 475.

Apparently recognizing the lack of support for its theory, The Florida Bar falls back to argue that, given the emotional vulnerability of the recipients, the mail solicitation at issue here is as invasive as the sound truck at issue at *Kovacs v. Cooper*, 336 U.S. 77 (1949), or the residential picketing addressed in *Frisby v. Schultz*, 487 U.S. 474 (1988). This argument is meritless. The core feature in both *Kovacs* and *Frisby* was the inability of the residents to disregard the communication—the blare of the sound truck or the din of the protesters could not be avoided. Here, by contrast, all the recipient must do to avoid the communication is to send the clearly marked, unopened letter on "the short journey from mail box to trash can." That burden is trivial by any measure, and surely cannot justify the serious abridgement of First Amendment rights at issue here.[2]

[2] *In re Anis*, 599 A.2d 1265, 126 N.J. 448 (N.J. 1992), on which petitioner relies (*see* Pet. Br. at 27-28), is not to the contrary. There are two crucial distinctions between *Anis* and this case. First, the concern of the *Anis* court about the intrusive nature of solicitation letters is fully dispelled by Florida's rule requiring such letters to be clearly marked. Apparently no such requirement existed in New Jersey. Second, unlike this case, which involves truthful and non-misleading communications, the offending letter in *Anis* contained serious misstatements of fact. 599 A.2d at 1271-72. Accordingly, *Anis* does not support petitioner here.

II. THE UNDERINCLUSIVE NATURE OF THE BAN CASTS DOUBT ON THE STRENGTH OF FLORIDA'S ASSERTED INTERESTS.

According to The Florida Bar, the mailing ban was enacted to protect citizens during a time of deep personal trauma from "crass commercial intrusion" upon their private grief. This goal—commendable in the abstract—is simply not advanced by the mailing ban. The fact is that the ban operates against only lawyers seeking to represent the accident victims or their families. It does not forbid contact by insurance adjusters and defense lawyers, who remain free to make in-person visits and telephone calls, and to send letters to recent accident victims or their families in an effort to settle the victim's claims. Thus, the ban does little to insulate accident victims and their families from unwelcome intrusions. Instead, the ban deprives victims of information concerning the availability of legal counsel at the time they need it most—when they are encircled by representatives of potential defendants urging the victims to compromise or waive their claims.[3]

Nor is the ban based on an accurate or even informed assessment of the needs of accident victims and their families. The Bar paternalistically speculates that what these victims need is peace and tranquility. But the Bar can cite no evidence to support its theory that accident victims want

[3] For instance, immediately following the crash of a Pan Am jetliner near New Orleans, representatives of the airline's insurance carrier began visiting and sending letters to the victim's families in an effort to settle claims. "Air Disasters Pit Insurers Against Lawyers," *Detroit Free Press*, Section NWS at 12B (August 18, 1987). Similar measures were taken by insurance carriers after other airline disasters. *E.g.*, "Putting a Price Tag on Life—Insurers Talk With Crash Victims Families," *Detroit Free Press*, Section NWS at 1A (March 7, 1987).

or benefit from this state-imposed 30-day insulation from lawyer solicitation letters.[4] *But see Edenfield v. Fane*, 113 S. Ct. at 1800 (requiring government, as a condition of regulating commercial speech, to show that the "the harms it recites are real" and that the restriction "will in fact alleviate ... [the problem] to a material degree").

Nor, as a practical matter, do the families of most accident victims have the opportunity simply to grieve in peace. The family of a seriously injured accident victim confronts difficult questions about treatment and rehabilitation. In a wrongful death case, the family is faced with burial and other expenses, as well as estate and probate issues. Inevitably, the family also encounters legal questions relating to whether some other party, who may bear responsibility for the accident, will be a source of compensation. Families should not be deprived of information regarding the availability of legal counsel when confronting these decisions—many, if not all, of which have legal aspects to them.

This Court has repeatedly held that underinclusive regulation in the First Amendment area "may diminish the credibility of the government's rationale for restricting speech in the first place." *City of LaDue v. Gilleo*, 114 S. Ct. 2038, 2044 (1994). *Accord The Florida Star v. B.J.F.*, 491 U.S. 524, 540 (1989) (underinclusiveness of statute raises serious doubts about whether state is serving the interests that it claims are furthered by the statute); *see also*

---

[4] The material cited by certain of petitioner's *amici* does not address this specific question. Nor, for that matter, does it focus on the core question here, namely, whether accident victims and their families would choose a ban on lawyer mailings during the period "when they are confronted with an unintelligible legal tangle and demands to waive or compromise their rights." *See McHenry v. The Florida Bar*, 21 F.3d at 1043 n.12 (citation omitted).

id. at 541-42 (Scalia, J., concurring); *FCC v. League of Women Voters of California*, 468 U.S. 364, 396-97 (1984); *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 516 (1981). The reasoning of *City of LaDue* applies with full force here, given the irrationality of the coverage of the Florida ban.

Indeed, the highly selective nature of the coverage of the ban raises serious questions as to whether Florida's asserted interests are genuine. After all, the Florida ban leaves accident victims at the mercy of insurance adjusters and defense lawyers, who may ring the doorbells of the victims, telephone, or send mail, without any restraint by the state, not even a warning on the exterior of the envelope. It is incomprehensible that Florida believes that, on the one hand, the receipt of a clearly marked solicitation letter from a lawyer is a gross invasion of privacy, while, on the other hand, a barrage of visits, telephone calls and letters from potential defendants and their representatives is not. Making matters worse, the only way that an accident victim can effectively be insulated from the flood of defense entreaties is to retain an attorney. Yet the Florida rule is designed to complicate, not simplify, that process, by cutting off the flow of information regarding the availability of legal counsel just when the accident victim is most in need.

The irrationality of Florida's ban is underscored by the fact that Florida has at its disposal a number of simple alternatives which would better achieve the asserted goal without abridging First Amendment rights. One far less intrusive option would be to impose a reasonable "cooling off" period, during which the accident victim or relative could repudiate any contract—including retainer agreements, settlements, and waivers—within a set period of time. That kind of device, which is now commonplace in other consumer transactions (*e.g.*, 16 C.F.R. § 429.1 (1992)), would avoid First Amendment problems, yet would directly advance Florida's interest in assuring that vulnerable accident victims, whose judgment might be impaired, are not exploited.

Another option would be for Florida to enact a statute that is both limited to wrongful death cases and universal in its sweep, forbidding all lawyers, insurance adjusters, and agents from making any contact at all with the grieving families for a set period of time. Both limitations are essential. The limitation to wrongful death cases rectifies the unjustifiably broad sweep of the current ban, which forbids direct-mail communications without regard to the severity of injury. There is no reason to assume that someone who has broken a leg in a minor automobile accident needs special protection by the state from lawyer solicitation letters. The second limitation addresses the underinclusiveness problem. While we would still question the constitutionality of any ban extending to direct mail solicitation—a practice we believe is innocuous—at least the rule would actually serve the interest of preserving the privacy of people in fact likely to be traumatized, unlike the ban at issue here.

Because the rule that Florida has enacted does not serve the purpose Florida asserts, and in fact undermines the interests of recent accident victims and their families, the Eleventh Circuit correctly invalidated the 30-day mailing ban.

CONCLUSION

For the reasons set forth above and in the brief of respondent, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

David C. Vladeck
(Counsel of Record)
Alan T.L. Sun

Public Citizen Litigation Group
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 833-3000

Attorneys for *Amicus Curiae*
Public Citizen, Inc.

December 5, 1994